by the terms of the trust agreement the money received by plaintiff from the trustee to the extent of such partner's interest in the assets not exceeding the amount of the notes was to be credited thereon, payments having been made by the trustee which more than satisfied such partner's notes, he was entitled to recover the overplus from plaintiff in assumpsit, as money had and received.

ROCKY MOUNT LOAN & TRUST CO. v. PRICE et al.

December 8, 1904.

[49 S. E. 73.]

APPEAL—REVIEW—SETTING ASIDE VERDICT—SETTING ASIDE JUDGMENT—CONSENT OF PARTIES—ESTOPPEL—BONDS—MATERIAL ALTERATION—INSTRUCTIONS.

1. In an action on bonds one of the defendants filed a plea of *non est factum*, the cause being continued as to him, and a judgment was rendered against the remaining obligors. Thereafter an order was entered reciting that the defendant pleading *non est factum*, and another, an administrator, having filed their statement of defenses and pleas at the last term, and no order having been entered in respect thereto, it was agreed that the filing of such papers should be entered *nunc pro tunc*. *Held*, that in view of such order, and the subsequent action of the parties treating the judgment as set aside, plaintiff was estopped to deny that it had been set aside as to the administrator.

2. The action of the court in setting aside a verdict for misdirection of the jury cannot be reviewed on appeal, where the instructions given are not contained in the record.

3. Where, in an action on a bond, one of the obligors pleaded *non est factum*, an instruction that if such defendant did not sign the bond, and his name was signed without his authority, the jury must find for the defendant, and that the burden of proof was on the plaintiff, was proper.

4. On appeal the evidence is to be treated as on a demurrer to the evidence.

5. In an action on bonds one of the defendants claimed an alteration in the bonds, after delivery, by inserting the name of a certain person as an obligor. The evidence showed that the bonds were given for land sold to the obligors, and that after the sale the defendant in question sold a part of his interest to the one whose name had been added to the bond. The obligee testified that shortly after they were delivered to him the obligors told him they wanted them back to get some other parties who had come into the deal to sign them, and that the bonds were given back to one of the obligors, and afterwards again delivered to the obligee, and the one who purchased the bonds from him testified that when he received them they were in the same condition as at the time of the action. *Held*, that an instruction that if, after the bonds were signed and delivered the name in question was added without the knowledge or consent of defendant, it was a material alteration, was not warranted, as the evidence tended to show that the real delivery of the bonds was when they were delivered the second time, and it did not appear that defendant did not know of the addition of the name in question.

6. In an action on bonds the fact that the name of one of the obligors was forged did not affect the liability of the others.